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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

AMOCO PRODUCTION COMPANY
Petitioner

VS.

VESTA INSURANCE COMPANY
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Fifth Circuit erred when it refused to apply the clearly erroneous standard of Rule 52(a) to the District Court's findings of fact, that Amoco was obligated to pay the entire amount of the Gonzales settlement and incurred 'ultimate net loss' in excess of the underlying limits of the Vesta policy.

2. Whether the United States Court of Appeals for the Fifth Circuit erred in failing to address on the merits Amoco's argument that Vesta's right to subrogation did not accrue until Vesta paid under the policy and in awarding Vesta relief under the subrogation provision of the Policy based upon theories not pleaded by Vesta.

3. Whether the United States Court of Appeals for the Fifth Circuit, due to its error in concluding that Vesta did not owe Amoco indemnity under the policy, also erred in its conclusion that Amoco was not entitled to recover its attorneys fees in defending the Gonzales suit and in awarding Vesta prejudgment interest on the money paid to Amoco.

LIST OF PARTIES

PETITIONER: Amoco Production Company

Parent: Amoco Corporation

Nonwholly owned subsidiaries:
Exma Oil Company, Gulf of Suez Petroleum Company, Fourth October Petroleum Company, Rudeis Oil Company, Torsina Oil Company, Trinidad Tobago Development, 10A Production B.V., Statfjord Transport A.S. & Company, K/S Statfjord A.S. & Company, Shahjah LPG Company, Limited, Aimea S.A. De C.V., Apache Corporation, East Texas Salt Water Disposal Company, Gravcap, Inc., Heat Transfer Research, Inc., Sultran Limited

RESPONDENT: Vesta Insurance Company

Petitioner does not have knowledge of whether Respondent has a parent company or any nonwholly owned subsidiaries and, if so, who they are.

Further, Vesta is the lead underwriter of several underwriters that participate in the risk for the insurance policy in question. They are:

Polaris Assuranse A/S, Storebrand Norden Reinsurance Company Limited, Uni Mutual General Insurance Company, Samvirke Skadeforsikring A/S, Gjensidige Norsk Skadeforsikring, Arendal Forsikringsselskab A/S, Arab Insurance Group (B.S.C.) and Skandia International Insurance Corporation

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OPINIONS BELOW

Petitioner, Amoco Production Company, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in this matter on March 29, 1993.

The opinion of the United States Court of Appeals for the Fifth Circuit, whose judgment is herein submitted for review, is published at 986 F.2d 981 (5th Cir. 1993). It is also printed in the Appendix to this Petition, at page A-11. The denial of the Petition for Rehearing by the United States Court of Appeals for the Fifth Circuit, dated April 23, 1993, is printed in the Appendix to this Petition, at page A-24.

The prior opinion and judgment in this matter by the United States District Court for the Southern District of Texas, Galveston Division, entered on January 27, 1992, was not reported, but is reprinted in the Appendix to this Petition, at page A-1.

GROUNDS FOR JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on March 29, 1993. The Petition for Rehearing was denied by the United States Court of Appeals for the Fifth Circuit on April 23, 1993. The jurisdiction of this Court is invoked pursuant to 28 U. S. C. § 1254 (1).

PROVISIONS INVOLVED

Fed. R. Civ. P. 52(a):

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for

purposes of review. *Findings of fact, whether based upon oral or on documentary evidence, shall not be set aside unless clearly erroneous,* and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rule 12 or 56 or any other motion except as provided in subdivision (c) of this rule. (emphasis added).

STATEMENT OF THE CASE

This is an insurance dispute. At issue in the District Court was whether Amoco Production Company's (Amoco) insurer, Vesta Insurance Company (Vesta), owed indemnity to Amoco for moneys paid by Amoco over and above Amoco's five million dollar self-insured retention, when Amoco satisfied its self-insured retention, in part, from funds received from contractual liability insurance from Amoco's contractor, Cantu Lease and Oilfield Services or one of its affiliates (Cantu).

Mr. Gonzales, an employee of Cantu, was injured at an Amoco plant in Texas while performing various oil field services that Cantu had contracted to perform for Amoco. Mr. Gonzales sued Amoco and others in a Texas state district court, alleging negligence and gross negligence. Vesta demanded that Amoco settle with Gonzales for Gonzales' $6,215,000 demand, and Amoco settled the Gonzales suit for that amount with no contribution by Vesta.

The contract between Amoco and Cantu required Cantu to defend and indemnify Amoco against the Gonzales claim. Cantu maintained contractual liability protection for this indemnity agreement.

Pursuant to Amoco's indemnity agreement with Cantu, Cantu's underwriters paid $3,500,000 of the $6,215,000 settlement between Amoco and Mr. Gonzales. Amoco paid the remaining $2,715,000.

Amoco maintained an insurance policy with Vesta, which provided in Section IV that Vesta agreed to indemnify Amoco for Amoco's "ultimate net loss" which Amoco sustained because of personal injury liability in excess of the underlying limits. According to the Policy, the underlying limit is the greater of (1) the amount recoverable under Amoco's underlying insurances or (2) a self-insured retention of $5,000,000 ultimate net loss in respect of each occurrence. The Policy defines "ultimate net loss" as "the total sum which [Amoco], or any company as his insurer becomes obligated to pay by reason of personal injury" claims through either adjudication or compromise and includes expenses for lawyers, litigation, settlement, adjustment and investigation of claims.

Vesta denied that it was obligated to reimburse Amoco for the sums over five million dollars that Amoco paid in the settlement. Pursuant to a letter agreement, Vesta agreed to "loan/advance" to Amoco the sum of $798,255. (Amoco owned 65.7% of the plant where Mr. Gonzales was injured. The difference between $6,215,000, the settlement amount, and Amoco's 5,000,000 self-insured retention is $1,215,000 and 65.7% of $1,215,000 is $798,255.) Further the parties agreed to resolve their dispute through a declaratory judgment action.

Vesta filed a declaratory judgment action seeking a declaration that it has no indemnity obligation to Amoco. Amoco counterclaimed for a declaration that Vesta owed indemnity under the policy and Vesta breached its contract by failing to unconditionally pay all sums due under the policy. Both parties Motions for Summary Judgment were denied by the District Court and the court set the case for trial. The parties submitted the case for trial to the Court based upon the parties' exhibits, affidavits, stipula-

tions of fact, proposed findings of fact and conclusions of law, and supplemental briefs.

The District Court concluded that Vesta owed indemnity under the policy and breached its insurance contract. The District Court's Final Judgment and Order contained findings of fact and conclusions of law. The District Court specifically found that "Amoco was obligated to pay the entire amount [of the Gonzales settlement], therefore, Amoco incurred 'ultimate net loss' in excess of the underlying limits of the Vesta Policy." *This was not a fact to which the parties had stipulated.*

The court also found, "Alternatively, Amoco and Cantu, acting as Amoco's insurer, were obligated to pay $6,250,000.00."

Accordingly, the court ordered that Vesta take nothing from Amoco and that Amoco recover from Vesta Amoco's attorney's fees, costs and expenses incurred in defending the Gonzales suit, together with prejudgment interest as provided by law.

After denial of its Motion to Alter and Amend Judgment, Vesta appealed. The United States Court of Appeals for the Fifth Circuit reversed and rendered, stating that the case had been submitted to and decided by the District Court on stipulated facts, that only questions of law were determined by the District Court, and that a *de novo* standard of review was appropriate. Nowhere in its opinion did the Court ever mention any of the factual findings of the District Court, much less discuss or analyze them. Instead, the Court substituted its judgment for that of the District Court.

BASIS FOR JURISDICTION IN THE UNITED STATES DISTRICT COURT

The jurisdiction of the United States District Court for the Southern District of Texas, Galveston Division, was based upon the Section 2 of Article III of the United States Constitution and 28 U. S. C. § 1332 (a) (2).

REASONS FOR ALLOWANCE OF THE WRIT

I. The Court of Appeals erred when it refused to apply the clearly erroneous standard of Rule 52(a) to the District Court's findings of fact.

The Court of Appeals ignored the District Court's findings of fact entirely and substituted its own judgment for that of the District Court. The Supreme Court has clearly instructed the Courts of Appeal that "appellate courts must constantly have in mind that their function is not to decide factual issues *de novo*," *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 573 (1985), *quoting, Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100 (1969). An appellate court should not make factual findings on its own. *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 714 (1986). In this case, the Court of Appeals did just that.

The outcome of this case depends upon whether Amoco incurred "ultimate net loss" in excess of its self insured retention of five million dollars. "Ultimate net loss" is defined as the total sum which Amoco or any company as its insurer becomes obligated to pay due to personal injury. The District Court found:

> 8. The Gonzales litigation settled prior to trial for $6,215,000. Amoco was obligated to pay the entire amount, therefore, Amoco incurred "ultimate net loss" in excess of the underlying limits of the Vesta policy.

These are findings of fact. This Court has previously noted the vexing nature of the distinction between questions of fact and questions of law, and stated there is no rule or principle that will unerringly distinguish a factual finding from a legal conclusion. *Pullman-Standard v. Swint*, 456 U.S. 273, 288 (1982).

Rule 52(a), however, applies to findings of fact, including those described as "ultimate facts," because they may determine the outcome of litigation. *Bose Corp. v. Consumers Union of United States*, 466 U.S. 485, 501 (1984). The Court has suggested that a fact is found "by the application of ordinary principles of logic and common experience which are ordinarily entrusted to the finder of

fact." *Bose,* 466 U.S. at 501, n.17. This is in contrast with a legal rule upon which the reviewing court must exercise its own independent judgment, *Bose,* 466 U.S. at 501, n.17, or a mixed question of law and fact — i.e., questions in which the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the statutory standard, or put another way, whether the rule of law as applied to the established facts is or is not violated. *Pullman-Standard,* 456 U.S. at 289, n.19. As the Court of Appeals for the 9th Circuit stated in *United States v. McConn,* 728 F.2d 1195 (9th Cir. 1984) (en banc), rulings of law become controlling precedent and, consequently, affect the rights of future litigants; rulings on factual issues, on the other hand, are generally of concern only to the immediate litigants. *McConn,* 728 F.2d at 1201.

There should be no doubt as to the factual nature of the trial court's finding that Amoco was obligated to pay the full amount of the Gonzales settlement. This finding by the District Court is of concern only to the litigants in this case and is specific to the insurance policy between these parties. That Amoco became obligated to pay the full amount of the Gonzales settlement by virtue of the settlement and the resulting judgment is a conclusion gained by the application of ordinary principles of logic and common experience.

Based upon this finding of fact, the District Court concluded, as a matter of law, that Vesta owed indemnity under the policy and breached its contract.

The Court of Appeals erroneously stated:

> The case was submitted to, and decided by, the district court on stipulated facts. Only questions of law were determined by that court, consequently our review is *de novo.*

The District Court's finding that Amoco was obligated to pay the entire settlement and Amoco incurred ultimate net loss in excess of the underlying limits of the Vesta policy were not stipulated facts, but the District Court's findings based upon the

stipulated evidence. The evidence showed that a judgment was entered against Amoco for the full amount of the settlement.

The Court of Appeals' refusal to apply Rule 52(a): (1) ignores the District Court opinion, which itself states the "Findings of Fact" made by that court; (2) ignores the express language of Rule 52(a), that "Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous;" (3) ignores the Supreme Court's admonitions in *Anderson*, 470 U.S. at 573, that Rule 52(a) applies "even when the District Court's findings do not rest on credibility determinations but are based instead on physical or documentary evidence or inferences from other facts; and (4) ignores the Court of Appeals' own statement of the Rule in *Brock v. El Paso Natural Gas Co.*, 826 F.2d 369, 372 (5th Cir. 1987), where the court says the clearly erroneous standard of Rule 52(a) governs the Court's review of the inferences the District Court draws from stipulated facts.

The Court of Appeals erred in relying upon *Carpenters Amended & Restated Health Benefit Fund v. Holleman Construction Co.*, 751 F.2d 763, 766 (5th Cir. 1985), for its use of *de novo* review. In *Holleman*, the Court of Appeals set forth the rule that interpretation of a contract — in other words, the meaning of the words — is subject to *de novo* review, except where parole or extrinsic evidence is used to determine the parties intent. *Holleman*, 751 F.2d at 766. The Court of Appeals relied on *Holleman* as authority for disregarding the District Court opinion in its entirety, and ruling on the case as a whole *de novo*. This was wrong.

The Court of Appeals failed to recognize that the District Court's judgment was based in the first instance on a finding of fact which the District Court applied to an unambiguous contract. Thus, this was not a case of contract interpretation. When the issue is application of the language in a contract, i.e., violation of its terms, courts typically review district court findings under a clearly erroneous standard. *U.S. v. Pollard*, 959 F.2d 1011,

1023-24 (D.C. Cir. 1992) and cases cited therein. This case is similar to many other cases where contract interpretation is not at issue, but application of the terms of the contracts to the facts is at issue. *See, Pan American World Air, Inc. v. Aetna Cas. & Sur. Co.*, 505 F.2d 989 (2nd Cir. 1974) (when District Court's findings of fact that coverage not excluded under policy were not clearly erroneous, judgment affirmed); *Boyd Construction Company v. T.L. James & Company, Inc.*, 477 F.2d 34 (5th Cir. 1973) (when District Court's finding of fact that delay was caused by T. L. James was not clearly erroneous, and contract precluded recovery if delay was caused by James, judgment affirmed); *Preston v. Curtiss National Bank*, 410 F.2d 367 (5th Cir. 1969) (when guarantee provided for revocation only on written notice and District Court's finding of no notice was not clearly erroneous, judgment against guarantor affirmed); *Green v. Aetna Insurance Company*, 397 F.2d 614 (5th Cir. 1968) (when completed operations policy provided coverage under certain circumstances and District Court's finding of facts that would not trigger coverage were not clearly erroneous, judgment affirmed); *United States Fidelity & Guaranty Co. v. State of Oklahoma*, 383 F.2d 417 (10th Cir. 1967) (when policy provided coverage under certain circumstances and District Court's findings of fact that would not trigger coverage were not clearly erroneous, judgment affirmed); *Cunningham v. Mitchell*, 374 F.2d 356 (5th Cir. 1967) (when contract required broker to acquire a loan to receive a commission and District Court finding that loan was not acquired was not clearly erroneous, judgment affirmed); *General American Transp. Corp. v. Sun Insurance Office, Ltd.*, 369 F.2d 906 (6th Cir. 1966) (when policy provided coverage for latent defects and District Court's finding of fact (a defective weld) that would trigger coverage was not clearly erroneous, judgment affirmed); *Horlbeck Products Corp. v. Madison Industries, Inc.*, 358 F.2d 745 (6th Cir. 1966) (when contract provided for certain performance and District Court's findings of fact regarding failure to perform and certain defenses were not clearly erroneous, judgment affirmed); *Edgar v. Travelers Insurance Company*, 351 F.2d

690 (8th Cir. 1965) (when insurance policy provided coverage for permissive use of a vehicle and District Court's finding of fact of no permissive use was not clearly erroneous, judgment affirmed); *Leach v. Maryland Casualty Co.*, 183 F.2d 43 (7th Cir. 1950) (when insurance policy provided coverage for permissive use of vehicle and District Court's finding of fact on issue was not clearly erroneous, judgment affirmed); *Wescott v. United States Fidelity & Guaranty Co.*, 158 F.2d 20 (4th Cir. 1946) (when insurance policy provided exclusion for coverage of employees, and District Court's finding of fact on issue was not clearly erroneous, judgment affirmed); *Prudential Ins. Co. of America v. Carlson*, 126 F.2d 607 (10th Cir. 1942) (when insurance policy covered accidental death only and District Court's finding of fact of accidental death was not clearly erroneous, judgment affirmed).

In this case, the Court of Appeals' opinion never mentioned any of the District Court's findings of fact, much less discussed or analyzed them.

The trial court's opinion that Amoco had satisfied the ultimate net loss provisions of the policy was based upon two grounds. The trial court specifically found that Amoco was obligated to pay the entire Gonzales settlement, or alternatively, Amoco and Cantu, as Amoco's insurer, were obligated to pay the settlement.

Amoco presented these issues to the Court of Appeals in the following points:

II. The trial court correctly held that Amoco exhausted its $5 million self-insured retention, which triggered Vesta's obligation to pay its share of the settlement in excess of the 5 million.

A. Whether Cantu was Amoco's insurer or the indemnity agreement insurance is immaterial, since Vesta's policy requires it to pay ultimate net loss in excess of Amoco's self-insured retention, ultimate net loss is the sum Amoco or any company acting as its insurer becomes obligated to pay and Amoco was obligated to pay $6,215,000 as a result of the Gonzales settlement.

B. Alternatively, the trial court's finding that Amoco and Cantu, acting as Amoco's insurer, were obligated to pay $6,215,000 is not clearly erroneous.

The Court of Appeals failed to address point II. A (that Amoco was obligated to pay the full amount of the settlement and thereby incurred ultimate net loss in excess of its self-insured retention), which was the principal reason advanced by the District Court for its decision. That point is governed by the District Court's findings of fact.

The Court of Appeals ignored the District Court's alternative finding, that "Amoco and Cantu, acting as Amoco's insurer, were obligated to pay $6,250,000.00," and held as a matter of law that "one party to a contract for services is not an 'insurer' of the other party to the contract solely because the first party indemnified the second party pursuant to an indemnity provision in that contract." In reaching this holding, the Court of Appeals failed to address the District Court's finding that Cantu was "*acting* as Amoco's insurer," which is all the Vesta policy required.

Additionally, the Court of Appeals failed to consider whether the case should be remanded for findings of fact as to whether Employers, the contractual liability insurer, was acting as Amoco's insurer. In footnote 3, the District Court stated, "In this context the argument as to whether Amoco was an insured of Employers of Texas Lloyd's and Employers National Insurance Company is much ado about nothing." The District Court did not make a finding of fact as to whether the Employers' companies were acting as Amoco's insurer for purposes of satisfying Amoco's self-insured retention. Amoco had contractual liability coverage as a result of its contract with Cantu and the terms of the Employers of Texas Lloyds and Employers National Insurance Company policies. As this Court said in *Icicle Seafoods*, 475 U.S. at 714:

> If the Court of Appeals believed that the District Court had failed to make findings of fact essential to a proper resolution of the legal question, it should have remanded

> to the District Court to make those findings. If it was of the view that the findings of the District Court were 'clearly erroneous' within the meaning of Rule 52(a), it could have set them aside on that basis. If it believed that the District Court's factual findings were unassailable, but that the proper rule of law was misapplied to those findings, it could have reversed the District Court's judgment.

In this case, the Court of Appeals failed to give deference to the trial court's function.

II. The Court of Appeals erred in failing to address on the merits Amoco's argument that Vesta's right to subrogation did not accrue until Vesta paid under the policy and in awarding Vesta relief under the subrogation provision of the policy based upon theories not pleaded by Vesta.

The Court of Appeals never addressed the merits of Amoco's argument that Vesta had no subrogation right to exercise against Cantu at the time Vesta made its payment to Amoco. Instead, the Court focused on whether Amoco's destruction of the subrogation right precluded it from recovering from Vesta and whether principles of equity applied.

The parties stipulated that Cantu and its insurers performed before Vesta made any payment to Amoco. Stipulation 8 provides:

> 8. The *Gonzales* litigation settled prior to trial for $6,215,000.00. The settlement was paid by Amoco and Employers of Texas Lloyd's and Employers National Insurance Company. Amoco paid the amount of $2,715,000 by check No. 904868 dated August 30, 1989. Employers of Texas Lloyd's and Employers National Insurance Company paid Gonzales $2,500,000 by check on August 28, 1989, pursuant to the insurance policies. Vesta reimbursed Amoco $798,255.00 by wire transfer in the amount of $598,691.25 on or about October 3, 1989, and an additional $199,563.75 on October 20, 1989. See Exhibits "13, "14", "15" and "16".

Vesta's subrogation rights, if any, did not accrue until it made payments to Amoco. *International Ins. Co. v. Medical-Professional Bldg.*, 405 S.W.2d 867, 869 (Tex. Civ. App. — Corpus Christi 1966, writ ref'd n.r.e.). Vesta has no right to payments made before its subrogation rights, if any, accrued. As of the dates of Vesta's payments, Amoco had no indemnity claim against Cantu or insurance claim against Employers of Texas Lloyd's/Employers National Insurance Company.

The Court of Appeals' opinion states:

> Amoco cites an intermediate Texas appellate court opinion to support the proposition that "where an insured settles with or releases a wrongdoer from liability for a loss before payment of the loss has been made to the insurance company, the latter's right of subrogation is thereby destroyed." Unfortunately for Amoco, such conduct also has the effect of forfeiting any claim the insured might have had under the insurance policy. Additionally, although the insurance company would no longer have a cause of action against the tortfeasor, it would have one against the insured.
>
> Amoco's argument also ignores the express language of the indemnity clause between Cantu and Amoco in which Cantu agreed to indemnify not only Amoco, but also its insurers. It is arguable that Vesta could proceed directly against Cantu for indemnity without relying on the subrogation clause.

Vesta has never pleaded a claim that it was entitled to reimbursement from Amoco because Amoco had somehow destroyed Vesta's subrogation rights by settling with Cantu prior to Vesta's payment to Amoco. Vesta made that assertion for the first time in its "Plaintiff, Vesta Insurance Company's Reply to Amoco Production Company's Response to Vesta's Motion to Alter and Amend Judgment." To grant Vesta relief in this appeal based upon such a theory would be to grant relief on a theory not pleaded or tried at the District Court.

Additionally, Amoco's position was misstated by the Court of Appeals. Amoco did not cite the case of *International Insurance*

Co. v. Medical Professional Bldg. for the proposition stated by the Court. Instead, Amoco cited the case for the proposition that the right of subrogation accrues with payment. This statement of the law is correct and controls the disposition of Vesta's subrogation claim.

Furthermore, Vesta has never made the argument raised by the Court of Appeals, that Vesta had a right of action directly against Cantu under the Amoco — Cantu indemnity contract. This argument has been advanced solely by the Court of Appeals and briefed by no one.

The Court of Appeals' treatment of the subrogation issue illustrates one of the problems inherent in a Court of Appeals retrying a case on appeal. The Court decided the case based upon theories *not* advanced by any party.

III. Since the Court of Appeals erred in its conclusion that Vesta did not owe Amoco indemnity under the policy, it also erred in its conclusion that Amoco was not entitled to recover its attorneys fees in defending the Gonzales suit and in awarding Vesta prejudgment interest on the money paid to Amoco.

The Court of Appeals recognized that attorneys fees are part of ultimate net loss, but decided they were not recoverable by Amoco since Amoco did not exhaust its self-insured retention. Since the District Court's findings of fact on this issue are governed by the clearly erroneous standard, and the findings are not clearly erroneous, the District Court's judgment awarding attorneys fee should be affirmed, and the Court of Appeals judgment, including its award of prejudgment interest to Vesta, should be reversed.

CONCLUSION

The standard set forth in Rule 52(a), governing the exercise of the Appellate Court's power to overturn findings of a District Court, "plainly does not entitle a reviewing court to reverse the

finding of the trier of fact simply because it is convinced that it would have decided the case differently. The reviewing court oversteps the bounds of its duty under Rule 52(a) if it undertakes to duplicate the role of the lower court." *Anderson*, 470 U.S. at 573.

This is a case in which the Court of Appeals overstepped the bounds of its duty. Without even mentioning, much less discussing or analyzing the District Court's opinion, the Court of Appeals reversed and rendered. In doing so, it ignored the standards set forth by this Court and the Courts of Appeal. Those standards require the Court of Appeals to defer to the District Court's fact findings.

To permit the Courts of Appeals to share more actively in the fact finding function undermines the legitimacy of the District Courts in the eyes of the litigants, multiplies appeals by encouraging appellate retrials of the same factual issues, and needlessly reallocates judicial resources. FED.R.CIV.P. 52(a) advisory committee's note (1985).

This Court has recognized that the trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise. *Anderson*, 470 U.S. at 574. Further, duplication of the trial judge's efforts in the Court of Appeals would contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources. *Anderson*, 470 U.S. at 575. As this Court has said, trial on the merits should be the main event rather than a tryout on the road. *Anderson*, 470 U.S. at 575. This is fundamental to the allocation of decision making authority among the courts.

For the foregoing reasons, Amoco Production Company respectfully requests that this Court grant this Petition for Writ of Certiorari, and after hearing, reverse the Court of Appeals and affirm the judgment of the District Court, or, alternatively, reverse the Court of Appeals and order remand to the District

Court for further findings of fact, and grant Petitioner such other and further relief as the Court deems appropriate.

Respectfully submitted,

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PETITIONER,
AMOCO PRODUCTION
COMPANY

APPENDIX

FINAL JUDGMENT AND ORDER

UNITED STATES DISTRICT COURT FOR

THE SOUTHERN DISTRICT OF TEXAS,

GALVESTON DIVISION

(ENTERED JANUARY 27, 1992)

This matter is before the Court on the Joint Motion of the parties. The parties have agreed to submit this action for decision based on previously filed Motions for Summary Judgment, responses and replies thereto, stipulations, pre-trial memoranda, and affidavits. The parties have also agreed to bear their own costs, expenses, and attorney's fees.

Plaintiff, Vesta Insurance Company ("Vesta"), brought this action seeking a declaration that it owes no indemnity obligation to Defendant, Amoco Production Company ("Amoco"). Amoco counterclaimed for a declaration that Vesta does owe an indemnity obligation, and that Vesta breached its obligation by failing to unconditionally pay sums due under a contract of insurance. For the reasons stated below, the Court is of the opinion that Vesta owes indemnity under the policy and has breached its insurance contract.

I. JURISDICTION AND VENUE

Jurisdiction is proper pursuant to 28 U.S.C. § 1332 because Plaintiff is an alien corporation with headquarters and principal place of business in Norway, and Defendant is a Delaware corporation with principal place of business in Houston, Texas.

Venue is proper in this District and Division because Defendant is a resident of this District. 28 U.S.C. § 1391(a).

II. FINDINGS OF FACT

The parties have stipulated to the following facts:

1. On October 26, 1987, Rodolfo Gonzales (*"Gonzales"*) was seriously injured at the Amoco Production Company Plant located near San Perlita, Texas while in the employ of Cantu Lease, Inc. (*"Cantu"*) or one of its affiliates.

2. As a result of these injuries Mr. Gonzales, Gonzales sued Amoco in Texas state court. See *Gonzales v. Amoco Prod. Co.*, No. C-210-88-F (Dist. Ct. of Hidalgo County, 332nd Judicial Dist. of Texas, Jan. 19, 1988); Stipulation of Facts, Exhibit 4.[1]

3. Gonzales was employed by Cantu.

4. At the time of Gonzales's injury, Amoco held no ownership interest in Cantu. Cantu was an independent contractor, and its relationship with Amoco, including indemnity and insurance requirements, was defined by contract. *See* Exhibit 2.

5. Employers of Texas Lloyd's and Employers National Insurance Company issued insurance, which included contractual liability coverage, to Cantu. *See* Exhibit 3.

6. Amoco was insured by Vesta under a Primary Integrated Risk Program of Insurance (the "Vesta Policy"). *See* Exhibit 1.

7. The Vesta policy was drafted over a long period. Neither party is able to determine who drafted the clauses in issue. The clauses at issue are as follows:

a. Section IV(1) (the *"Coverage Clause"*) which provides in relevant part:

> Underwriters hereby agree to indemnify the Assured for ultimate net loss in excess of the underlying limits hereafter stated, subject to the limitations, conditions and other terms of this Policy, which the Assured may sustain by reason of the liability imposed upon the Assured by law, or

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[1] Hereinafter referenced by Exhibit number only.

assumed by the Assured under contract or agreement.

A. **PERSONAL INJURY LIABILITY**

For Damages, including damages for care, maintenance and loss of services, and expenses as more fully defined by the term "ultimate net loss", [sic] because of personal injury, including death at any time resulting therefrom, sustained by any person or persons.

Exhibit 1 at 46.

b. Section IV(3) (the *"Underlying Limits Clause"*), which provides in relevant part:

Underwriters limit of liability under coverage 1A or coverage 1B, or both combined, shall be only for the ultimate net loss in excess of the greater of:

(A) the amount recoverable under Underlying Insurances,

or (B) a self-insured retention of $5,000,000 ultimate net loss in respect of each occurrence . . . .

Id. at 48.

c. Paragraph E(6) under the title "Conditions" (the *"Ultimate Net Loss Clause"*) which provides:

The term "ultimate net loss" shall mean the total sum which the Assured, or any company as his insurer becomes obligated to pay by reason of personal injury or property damage claims, either through adjudication or compromise and shall also include hospital, medical and funeral charges and all sums paid as salaries, wages, compensation, fees, charges and law costs, premiums on attachments or appeal bonds, interest, expenses for doctors, lawyers, nurses and investigation and other persons and for litigation, settlement, adjustment and investigation of claims and suits which are paid as a consequence of any occurrence covered hereunder excluding only the

> salaries of the Assured's or any underlying insurer's permanent employees.

Id. at 51.

d. Paragraph L under the title "Conditions" (the *"Subrogation Clause"*), which provides:

> Inasmuch as this Policy is "Excess Coverage", [sic] the Assured's right of recovery against any person or other entity cannot be exclusively subrogated to the Underwriters. It is, therefore, understood and agreed that in case of any payment hereunder, the Underwriters will act in concert with all other interests (including the Assured) concerned, in the exercise of such rights of recovery. The apportioning of any amounts which may be so recovered shall follow the principle that any interests (including the Assured) that shall have paid an amount over and above any payment hereunder, shall first be reimbursed up to the amount paid by them; the Underwriters are then to be reimbursed out of any balance then remaining up to the amount paid hereunder; lastly, the interests (including the Assured) of whom this coverage is in excess are entitled to claim the residue, if any. Expenses necessary to the recovery of any such amounts shall be apportioned between the interests (including the Assured) concerned, in the ratio of their respective recoveries as finally settled.

Id. at 53.

8. The *Gonzales* litigation settled prior to trial for $6,215,000.00. Amoco was obligated to pay the entire amount, therefore, Amoco incurred "ultimate net loss" in excess of the underlying limits of the Vesta Policy.

9. Amoco demanded and received *contractual* indemnity from Cantu and Employers of Texas Lloyd's in the amount of 3.5 million dollars. The settlement was paid by Amoco, Employers Texas Lloyd's and Employers National Insurance Company. Amoco paid $2,715,000.00; the others paid $3,500,000.00 pursuant to

insurance contracts between themselves and Cantu. *See* Exhibits 13-16, 18.

10. Amoco held a 65.7% ownership interest in the relevant property. Pursuant to the Vesta Policy, Vesta reimbursed Amoco for $798,255.00, which is 65.7% of 1.215 million, the difference between the settlement and $5,000,000.00. Amoco has not reimbursed Vesta for this amount. *See* Exhibit 1 at 57-58; Exhibit 17.

11. Any finding of fact which may be deemed a conclusion of law is deemed as such.

III. CONCLUSIONS OF LAW

1. Vesta argues that it is entitled to reimbursement by virtue of the Subrogation Clause. This argument is untenable. First, an insurer cannot exercise subrogation rights against its own insured where the injury was caused by the insured's negligence. *Stafford Metal Works, Inc. v. Cook Paint & Varnish Co.*, 418 F. Supp. 56, 58 (N.D. Tex. 1976). In the instant case it is undisputed that Gonzales's injuries were caused by Amoco's negligence.

More importantly, subrogation is an equitable doctrine that allows an insurer to "step into the shoes" of its insured and assert the insured's rights against third parties. However, the insurer may only assert those rights that the insured could have asserted against a third party *as a result of the third party's breach of a legal duty that he owed to the insured. Id.* To give a trivial example, if Smith is injured in an automobile accident because of Jones's negligence, Smith's insurer may pay Smith and then assert Smith's rights against Jones. The insurer may only assert those rights that Smith has against Jones as a result of the automobile accident. It may not assert other, unrelated rights Smith may have against Jones.

In the instant case, Gonzales had no right of action against Cantu as a result of his injuries. Therefore, Amoco had no right of action for indemnity against Cantu *as a result of Gonzales's accident*. That is, Amoco could not have maintained an action for

indemnity against Cantu based solely on the *Gonzales* litigation. But/for the indemnity contract, Amoco would have had no right of action against Cantu. Thus, even assuming that Vesta could exercise subrogation rights against Amoco even though Amoco was at fault, no subrogation rights existed. Amoco's indemnity rights against Cantu were the result of an unrelated contractual relationship between the two, and Gonzales's injuries were merely a condition precedent to Cantu's performance.

2. Vesta also argues that because $3,500,000.00 of the *Gonzales* settlement was paid with the proceeds of the Amoco/Cantu contract, Amoco has not exhausted its $5,000,000.00 self-insured retention, and therefore Vesta is entitled to reimbursement. Vesta's argument appears to be that because Amoco chose to act as a self-insurer,[2] it was required to pay the first $5,000,000.00 out of its "own money." This argument is also without merit.

The Court has found nothing in law or in the Vesta policy that prohibits Amoco from satisfying all or part of its self-insured retention by contractual liability insurance or indemnity payments. The Vesta policy refers to sums which Amoco or any company acting as its insurer becomes obligated to pay. As noted above, Amoco was obligated to pay $6,250,000.00 as a result of the *Gonzales* settlement. Alternatively, Amoco and Cantu, acting as Amoco's insurer, were obligated to pay $6,250,000.00.[3] *See*

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[2] Under the Underlying Limits Clause, Vesta is liable only for the ultimate net loss in excess of the underlying insurances or a $5,000,000.00 self-insured retention. Amoco agrees that the latter alternative applies in this case, but argues that it may satisfy the self-insured retention with other liability insurance or indemnity contracts.

[3] In this context the argument as to whether Amoco was an insured of Employers of Texas Lloyd's and Employers National Insurance Company is much ado about nothing. Irrespective of this questions, both insurance companies were contractually obligated to make certain payments to Cantu, who was likewise contractually obligated to make certain payments to Amoco. For present purposes, it is immaterial whether these contracts were insurance contracts. The point is that it

Board of Ins. Comm'r v. Kansas City Title Ins. Co., 217 S.W.2d 695, 697 (Tex. Civ. App. — Austin 1949, writ ref'd n.r.e.) (contract for indemnity is insurance to extent that it provides for payment of loss or damages). Therefore, under the plain language of the Vesta policy, Vesta was obligated to pay $1,250,000.00.

3. Amoco is entitled to recover its legal fees, costs, and expenses incurred in defending the *Gonzales* suit. These fees, costs, and expenses were a part of the "ultimate net loss." *See* Ultimate Net Loss Clause, Exhibit 1 at 51.

4. Any conclusion of law which may be deemed a finding of fact is deemed as such.

IV. COURT'S RULING

The Court DECLARES that any money paid to Amoco or on Amoco's behalf by virtue of any indemnity agreement or contractual liability insurance is part of Amoco's self-insured retention.

The Court further DECLARES that Amoco has satisfied its $5,000,000.00 self-insured retention.

The Court further DECLARES that Vesta's obligations under the policy are triggered after said self-insured retention is exhausted.

Therefore, it is hereby ORDERED, ADJUDGED, AND DECREED that Vesta should take nothing from Amoco.

It is further ORDERED that Amoco should have judgment against Vesta for Amoco's attorney's fees, costs, and expenses incurred in defending the *Gonzales* suit, together with prejudgment interest thereon as provided by law.

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would be manifestly unfair to allow Vesta to avoid its contractual obligations simply because Amoco had the good sense to protect itself from payments within its self-insured retention, and Cantu likewise had the good sense to insure itself against the contingency that it should become liable to make such payments.

It is further ORDERED that Amoco will submit to the Court, within ten days of the entry of this Order, an Affidavit of Attorney's Fees and Proposed Order which comply with the guidelines set out in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974).

It is further ORDERED that each party will bear its own attorney's fees, costs, and expenses in this Court.

This is a final judgment.

Done at Galveston, Texas, this 24th day of January, 1992.

Samuel B. Kent
United States District Judge

FINAL JUDGMENT

UNITED STATES DISTRICT COURT FOR

THE SOUTHERN DISTRICT OF TEXAS,

GALVESTON DIVISION

(ENTERED JANUARY 27, 1992)

The Court having filed its findings of fact and conclusions of law herein directing the entry of judgment in favor of the Defendant and against the Plaintiff:

The Court DECLARES that any money paid to Amoco or on Amoco's behalf by virtue of any indemnity agreement or contractual liability insurance is part of Amoco's self-insured retention.

The Court further DECLARES that Amoco has satisfied its $5,000,000.00 self-insured retention.

The Court further DECLARES that Vesta's obligations under the policy are triggered after said self-insured retention is exhausted.

Therefore, it is hereby ORDERED, ADJUDGED, AND DECREED that Vesta should take nothing from Amoco.

It is further ORDERED that Amoco should have judgment against Vesta for Amoco's attorney's fees, costs, and expenses incurred in defending the *Gonzales* suit, together with prejudgment interest thereon as provided by law.

It is further ORDERED that Amoco will submit to the Court, within ten days of the entry of this Order, an Affidavit of Attorney's Fees and Proposed Order which comply with the guidelines set out in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974).

It is further ORDERED that each party will bear its own attorney's fees, costs, and expenses in this Court.

This is a final judgment.

Done at Galveston, Texas, this 24th day of January, 1992.

Samuel B. Kent
United States District Judge

OPINION

UNITED STATES DISTRICT COURT OF APPEALS

FOR THE FIFTH CIRCUIT

(MARCH 29, 1993)

In this Texas diversity case, the district court held, in its declaratory judgment from which Plaintiff-Appellant Vesta Insurance Company appeals, that (1) the subrogation clause in the Vesta policy of insurance does not apply to allocation of benefits between Defendant-Appellee Amoco Production Company and its insurers, and (2) Vesta owed Amoco attorneys' fees for its defense of a personal injury suit by Rudolfo Gonzales for the injuries he sustained in an accident at Amoco's facility. Disagreeing with the district court's interpretation of the contractual provisions as a matter of law, and with that court's application of Texas law to the admittedly intricate facts of this case, we reverse and render judgment in favor of Vesta.

I. FACTS AND PROCEEDINGS

Gonzales was seriously injured at Amoco's plant located near San Petlita, Texas, while in the employ of Cantu Lease, Inc. Gonzales sued Amoco and others in state district court, alleging that the negligence and gross negligence of all defendants was the producing cause of his injuries. Ultimately this negligence suit was settled by agreement among all of the parties, and a final judgment was entered providing for Gonzales to recover the sum of $6,215,000. At the time he was injured, Gonzales was performing various oil field services that Cantu had contracted to perform for Amoco under a "Well and Lease Service Master Contract"

(the Master Contract). Pursuant to paragraph 10 of the Master Contract, Cantu as contractor agreed to:

> [D]efend, indemnify, and hold Amoco, its joint owner or owners, if any and their insurers, harmless from and against any and all losses, costs, expenses, and causes of action, including attorneys' fees and court costs, for injuries to and death of contractor's and its subcontractor's employees, arising out of, incident to or in connection with any and all operations under this contract, and whether or not such losses, costs, expenses, and causes of action are occasioned by or incident to or the result of the negligence of Amoco, its joint owner or owners, if any, and its agents, representatives, and employees.

Cantu maintained insurance coverage with Employer's of Texas Lloyds and Employer's National Insurance Company (collectively, Cantu's underwriters). This coverage included contractual liability protection for Cantu on its indemnity agreement with Amoco. The Cantu insurance policies listed various other oil and gas exploration and production companies as co-assureds, but Amoco was not included on that list.

Amoco maintained a Primary Integrated Risk Program of insurance with a group of underwriters headed by Vesta. Section IV of the program document covered Amoco for third party personal injury claims like the one suffered by Gonzales. Section IV specifies that:

> [Vesta's] limit of liability . . . shall be only for the ultimate net loss in excess of the greater of:
>
> (A) the amount recoverable under Underlying Insurances,
>
> or
>
> (B) a self-insured retention of $5,000,000 ultimate net loss in respect of each occurrence . . . (hereinafter called the "underlying limits")
>
> and then only up to the amount not exceeding $35,000,000 in respect of each occurrence subject to a

> limit of $35,000,000 in the aggregate for each annual period during the currency of this policy . . .

The Vesta policy further provides that:

> The term "ultimate net loss" shall mean the total sum which the assured [Amoco] or any company as his insurer becomes obligated to pay, by reason of personal injury . . . claims, either through adjudication or compromise and shall also include . . . expenses for doctors, lawyers, nurses, and investigators . . . and for litigation, settlement, adjustment, and investigation of claims."

The policy also expressly addresses subrogation rights:

> Inasmuch as this Policy is "Excess Coverage", [sic] the Assured's right of recovery against any person or other entity cannot be exclusively subrogated to the Underwriters [Vesta]. It is, therefore, understood and agreed that in case of any payment hereunder, the Underwriters [Vesta] will act in concert with all other interests (including the Assured) concerned, in the exercise of such rights of recovery. The apportioning of any amounts which may be so recovered shall follow the principle that any interests (including the Assured) that shall have paid an amount over and above any payment hereunder, shall first be reimbursed up to the amount paid by them; the Underwriters [Vesta] are then to be reimbursed out of any balance then remaining up to the amount paid hereunder; lastly the interests (including the Assured) of whom this coverage is in excess are entitled to claim the residue if any. Expenses necessary to the recovery of any such amounts shall be apportioned between the interests (including the Assured) concerned, in the ratio of their respective recoveries as finally settled.

The settlement with Gonzales was entered into with the full knowledge and approval of Cantu and its underwriters and Amoco and all of its underwriters. Gonzales executed a settlement agreement releasing Amoco and all of its underwriters. In return, Amoco paid $2,715,000 to Gonzales, and Cantu's underwriters

paid him $3,500,000 — the limits of their policy coverage — totalling $6,215,000.

The plant where Gonzales was injured belonged to a joint venture in which Amoco held a 65.7% ownership interest. A dispute arose between Amoco and Vesta as to the amount, if any, that Vesta was obligated to reimburse Amoco for the sums it paid in the Gonzales settlement. Pursuant to a letter agreement, Vesta agreed "loan/advance" to Amoco the sum of $798,255 (being 65.7% of the $1,215,000 difference between the total settlement and the $5,000,000 "underlying amount"); these parties agreeing to resolve their dispute through a declaratory judgment action which Vesta filed against Amoco in the federal district court at Galveston.

After the matter was presented on cross motions for summary judgment, the court held that Vesta was obligated to Amoco for the full amount of the $798,255 "loan/advance" under the terms of the policy. The court further held that Amoco was entitled to recover from Vesta the full amount of attorneys' fees incurred in defending the *Gonzales* suit, together with interest thereon. Vesta timely appealed.

II. ANALYSIS

This diversity case is governed by Texas substantive law.[4] The case was submitted to, and decided by, the district court on stipulated facts. Only questions of law were determined by the court, consequently our review is *de novo*.[5]

A. "Insurer" Status

Under the terms of the contract between Vesta and Amoco, Vesta was only liable to Amoco for an "ultimate net loss" that

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[4] *Erie R.R. v. Thompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938).

[5] *Carpenters Amended and Restated Health Benefit Fund v. Holleman Construction Co.*, 751 F.2d 763, 766 (5th Cir. 1985).

exceeded $5,000,000. This contract defined "ultimate net loss" to include the total sum that Amoco or any company as its insurer became obligated to pay because of, inter alia, personal injury claims.

In the instant action, Amoco paid $2,715,000 directly to Gonzales, and Cantu, through its underwriters, paid Gonzales $3,500,000. If Cantu or its underwriters paid this money as Amoco's insurers, Amoco's "ultimate net loss" would clearly exceed $5,000,000 by $1,715,000 and Vesta would be liable to Amoco for 67.5% of that excess. Initially, therefore, we must determine whether Cantu and its underwriters paid Gonzales as Amoco's insurers.

Cantu contracted to operate and service wells and leases for Amoco. That contract obligated Cantu to "defend, indemnify, and hold . . . harmless" Amoco and its insurers "from and against any and all losses, costs, expenses, and causes of action . . . arising out of, incident to or in connection with any and all operations under the contract." Amoco proffered no other evidence that Cantu was its insurer.

Although an indemnity clause in a contract for services bears some relationship to insurance principles, the mere inclusion of such a clause is insufficient to renter the indemnifying party an "insurer" of the other party. "For openers," *Black's Law Dictionary* provides some guidance in determining whether a contractual indemnitor is an insurer. "Indemnity" is defined to include a "contractual or equitable right under which the entire loss is shifted from a tortfeasor who is only technically or passively at fault to another who is primarily or actively responsible,"[6] and an "Indemnitor" is "the person who is bound by an indemnity contract to indemnify or protect the other."[7] Insurance is defined as a "contract whereby, for a stipulated consideration, one party

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[6] Black's Law Dictionary 769 (6th ed. 1990).

[7] *Id.*

undertakes to compensate the other for loss on a specified subject by specified perils,"[8] and an "Insurer" is "the underwriter or insurance company with whom a contract of insurance is made."[9] These definitions suggest a substantive distinction between a party bound by a contractual indemnity clause and an insurer.

In defining the "business of insurance," the Supreme Court has stated, "The primary elements of an insurance contract are the spreading and underwriting of a policyholder's risk."[10] This definition also appears to be distinct from Cantu's status under the contract with Amoco.

Our analysis cannot stop at this point, however. Federal law expressly provides "that the business of insurance, and every person engaged therein shall be subject to the laws of the several states which relate to the regulation or taxation of such business."[11] Although the regulation of insurance is not exclusively delegated to the states, state law is a primary source of such regulation. "No act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance . . . ."[12] We must therefore examine the relevant Texas laws.

In Texas, as in most if not all states, insurance is a heavily regulated business.[13] Amoco presented no evidence that Cantu complied with the statutory requirements for qualification as a insurer. Further, the term "Insurance Business" is statutorily

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[8] *Id.* at 802.

[9] *Id.* at 808.

[10] *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 211, 99 S.Ct. 1067, 1073, 59 L.Ed.2d 261 (1979).

[11] 15 U.S.C. § 1012(a) (1992).

[12] 15 U.S.C. § 1012(b) (1992).

[13] See generally Tex.Ins.Code Ann. (Vernon 1981).

defined in article 1.14-1 of the Texas Insurance Code,[14] and no conduct required of Cantu by the indemnity clause comes within the ambit of this definition.[15] We hold that one party to a contract for services is not an "insurer" of the other party to the contract solely because the first party indemnifies the second party pursuant to an indemnity clause in that contract.

B. Application of Subrogation Clause

Having determined that Cantu was not acting as Amoco's insurer when it paid Gonzales and therefore did not make that payment on behalf of Amoco, we must next determine how to apportion Cantu's payment between Amoco and Vesta. The subrogation clause in the contract between Amoco and Vesta establishes that any amounts recovered shall be apportioned among the parties as follows: 1) any party that has already paid more than its designated share shall first be reimbursed up to the excess amount paid; 2) Vesta is then to be reimbursed out of any balance then remaining up to the amount it paid; and 3) lastly Amoco is entitled to claim any residue.

Under the terms of their contract, Vesta would be liable only after Amoco first satisfied a $5,000,000 self insurance retention. Amoco actually paid $2,715,000 to Gonzales — significantly less than the $5,000,000 self insurance retention. Consequently, if the subrogation clause applies to Cantu's payment, that payment must first be credited to any amount paid by Vesta before Amoco would be entitled to the residue.

Amoco argues that the subrogation clause should not be applied to the instant case because an insurer cannot exercise its right of subrogation against its own insured — it would defeat the

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[14] Tex.Ins.Code Ann. art. 1.14-1(2) (Vernon Supp. 1992).

[15] *See Board of Ins. Comm'rs v. Kansas City Title Ins. Co.*, 217 S.W.2d 695 (Tex. Civ. App. — Austin 1949, writ ref'd n.r.e.) (holding that an agency contract was not reinsurance despite the fact that it required one party to indemnify the other party).

purpose of insurance if an insurer could pay a loss then seek reimbursement from the insured. Although this may be a correct general statement of the law, it does not control the present situation. Vesta is not attempting to exercise subrogation rights against Amoco. Vesta's suit is based on a subrogation theory, but that subrogation theory runs against Cantu through Amoco, not against Amoco itself. Vesta is suing Amoco for reimbursement rather than for subrogation. This direct action for reimbursement is allowable because Cantu has already indemnified Amoco.[16]

Amoco also argues that Vesta's right to subrogation did not accrue until Vesta paid under the insurance policy. As Amoco had already been indemnified by Cantu, Amoco had no cause of action against Cantu by the time that Vesta made a payment under the insurance policy. And, as Amoco no longer had a cause of action against Cantu, there was no cause of action to which Vesta could be subrogated when it paid under the insurance policy. Therefore, Vesta's subrogation cause of action ceased to exist before it accrued. This argument does not advance Amoco's position.

Amoco cites an intermediate Texas appellate court opinion to support the proposition that "where an insured settles with or releases a wrongdoer from liability for a loss before payment of the loss has been made to the insurance company, the latter's right of subrogation is thereby destroyed."[17] Unfortunately for Amoco, such conduct also has the effect of forfeiting any claim the insured might have had under the insurance policy.[18] Addi-

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[16] *Peavey Co. v. M/V Anpa*, 971 F.2d 1168, 1176-78 (5th Cir.1992); *Gulf Ins. Co. v. Texas Casualty Ins. Co.*, 580 S.W.2d 645, 648 (Tex. Civ. App. — Fort Worth 1979, writ ref'd n.r.e.); *Gulf Ins. Co. v. White*, 242 S.W.2d 663, 666 (Tex. Civ. App. — Dallas 1953, no writ).

[17] *International Insurance Co. v. Medical Professional Bldg.*, 405 S.W.2d 867, 869 (Tex. Civ. App. — Corpus Christi 1966, writ ref'd n.r.e.).

[18] *Gulf Ins. Co. v. Texas Cas. Ins. Co.*, 580 S.W.2d 645, 648 (Tex. Civ. App. — Fort Worth 1979, writ ref'd n.r.e.); *Foundation Reserve Ins.*

tionally, although the insurance company would no longer have a cause of action against the tortfeasor, it would have one against the insured.[19]

Amoco's argument also ignores the express language of the indemnity clause between Cantu and Amoco in which Cantu agreed to indemnify not only Amoco, but also its insurers. It is arguable that Vesta could have proceeded directly against Cantu for indemnity without relying on the subrogation clause.

Finally, Amoco claims that subrogation is a purely equitable doctrine and cites the district court's statement that "it would be manifestly unfair to allow Vesta to avoid its contractual obligations simply because Amoco had the good sense to protect itself from payments within its self insured retention."

Initially, we question the soundness of this statement by the district court. Vesta and Amoco both appear to be experienced business entities. The agreed statement of facts submitted to the district court recites: "The Vesta policy was drafted by each of the parties over a long period of time. Neither party is able to determine who drafted the actual clauses in issue [including the subrogation clause]." The language of the subrogation clause is not unusual or difficult to understand. Under the terms of the policy, Amoco could separately insure itself for any or all of its $5,000,000 self insurance retention. Amoco failed to take advantage of this opportunity, opting instead to include only an indemnity clause in the contract with Cantu — an indemnity clause which itself recognized the potential rights of Amoco's insurers in any indemnification.

Co. v. Cody, 458 S.W.2d 214, 216 (Tex. Civ. App. — Dallas 1970, no writ); *State Farm Mutual Automobile Ins. Co. v. Elkins*, 451 S.W.2d 528, 531 (Tex. Civ. App. — Tyler 1970, no writ); *Gulf Ins. Co. v. White*, 242 S.W.2d 663, 666 (Tex. Civ. App. — Dallas 1953, no writ); accord *Millers Mutual Fire Ins. Co. v. Mitchell*, 392 S.W.2d 703, 706 (Tex. Civ. App. — Tyler 1965, no writ).

[19] *Gulf Ins. Co. v. White*, 242 S.W.2d at 666.

The inclusion of the indemnity clause did eventuate to Amoco's benefit, albeit not to the extent desired by Amoco. The sums paid by Cantu had the effect of reducing by some $2,285,000 the amount that otherwise would have been paid by Amoco. If the settlement with Gonzales had not exceeded $5,000,000, the entire amount of the indemnification would have inured to Amoco's benefit; only if Gonzales's damages had exceeded $8,500,000 would the indemnity clause with Cantu have been of no benefit to Amoco. Even in this age of sizeable recoveries, an award of less than 8.5 million dollars is not so infrequent that Amoco could not have reasonably expected to benefit from the inclusion of the indemnity clause in its contract with Cantu. We are not at all convinced that there is any disparity in the equities here.

But even assuming that such a disparity existed, we would question the application of equitable principles to this subrogation claim. The instant case involves what Texas courts term "conventional subrogation," (subrogation that arises by contract) as distinguished from "legal subrogation" (subrogation that arises by operation of law).[20] Admittedly, legal subrogation is an equitable concept and thus is governed by the principles of equity.[21] But even though some jurisdictions treat the distinction between conventional and legal subrogation as merely procedural, Texas does not.[22] Instead, Texas courts "generally allow a subrogee claiming against a third party under conventional subrogation to recover without regard to the relative equities of the parties."[23]

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[20] *Lexington Ins. Co. v. Gray*, 775 S.W.2d 679, 683 (Tex. App. — Austin 1989, writ denied).

[21] *Id., Galbraith-Foxworth, Lumber Co. v. Long*, 5 S.W.2d 162 (Tex. Civ. App. 1928, writ ref'd); see also *United States Fidelity & Guaranty Co. v. First National Bank in Dallas, Tex.*, 172 F.2d 258 (5th Cir. 1949).

[22] *Lexington Ins. Co. v. Gray*, 775 S.W.2d at 683.

[23] *Id.*; see also *Girard Fire & Marine Ins. Co. v. Farmer*, 53 S.W.2d 1016 (Tex. Comm'n App. 1932, judgm't adopted); *Duval County Ranch Co. v. Alamo Lumber Co.*, 663 S.W.2d 627, 637 (Tex. App. —

Texas law further recognizes that an underwriter is entitled to the benefits of subrogation as a matter of law (as distinguished from equity) even if its insured's right of recovery is contractual.[24] The San Antonio Court of Appeal interpreted a subrogation clause similar in wording to that in the Vesta policy to mandate that among excess carriers those contractually most remote from the primary coverage stand first in line when subrogation recoveries are distributed. "Where the insurers' coverage is in the nature of layers, the excess carrier should recover under subrogation before primary insurers can be reimbursed. One can look at subrogation recovery as reducing the net loss, in which case the excess carriers would not be obligated to pay the loss."[25]

Applying those same concepts to the instant case, in which the coverage provided by Vesta is excess to the self-insured underlying limits that Amoco was obligated to furnish, we conclude that the $3,500,000 payment contributed by Cantu's insurers towards the *Gonzales* settlement should be deemed to come "off the top" of the ultimate net loss that Amoco sustained as a result of the *Gonzales* settlement. So doing leaves the balance of the funds, which were advanced by Amoco for the *Gonzales* settlement, as

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Amarillo 1983, writ ref'd n.r.e.); *Quincy Mutual Fire Ins. Co. v. Jones*, 486 S.W.2d 126 (Tex. Civ. App. — Dallas 1972, no writ); *F.H. Vahlsing, Inc. v. Hartford Fire Ins. Co.*, 108 S.W.2d 947 (Tex. Civ. App. — San Antonio 1937, writ dism'd).

[24] *F.H. Vahlsing, Inc. v. Harford Fire Insurance*, 108 S.W.2d 947 (Tex. Civ. App. — San Antonio 1937, writ dism'd); *Rushing v. International Aviation Underwriters, Inc.*, 604 S.W.2d 239 (Tex. Civ. App. — Dallas, 1980, writ ref'd n.r.e.); *Duval County Ranch Co. v. Alamo Lumber Co.*, 663 S.W.2d 627 (Tex. App. — Amarillo 1983, writ ref'd n.r.e.); *Highlands Insurance Co. v. New England Ins. Co.*, 811 S.W.2d 272 (Tex. App. — San Antonio 1991, no writ) recognizing that subrogation was available even when the insured's right to recover rests on a Mary Carter settlement agreement).

[25] *Hightland Ins. Co. v. New England Ins. Co.*, 811 S.W.2d 276, 278 (Tex. App. — San Antonio 1991, no writ) (quoting 16 Couch on Insurance § 61.48 at 133 (2d ed. 1983)).

amounts which Amoco was obligated to pay under its self-insured underlying limit.

C. Attorneys' Fees

The district court also erred in awarding judgment in favor of Amoco against Vesta for the attorneys' fees incurred by Amoco in its defense of the *Gonzales* suit. The definition of the term "ultimate net loss" in the Vesta insurance policy expressly and unambiguously includes "expenses for doctors, lawyers, nurses, and investigators and other persons and for litigation, settlement, adjustment and investigation of claims and suits which are paid as a consequence of any occurrence covered hereunder." There is no separate covenant on the part of the Vesta underwriters to pay court costs and attorneys' fees or to provide a defense for Amoco. Rather, all litigation costs and expenses are simply built into the determination of its "ultimate net loss." Given our determination that its ultimate net loss, including attorneys' fees and costs has not exceeded $5,000,000, Amoco cannot recover from Vesta the attorneys' fees incurred in defending the Gonzales suit.

D. Interest

Vesta asserts that it is entitled to not only the reimbursement of the $798,255 loan/advance that it made to Amoco, but also to interest on that amount. We agree. Amoco's argument that interest cannot be awarded to Vesta because the loan/advance agreement did not expressly provide for the payment of interest is unpersuasive. The general rule is that "where the nature of the contract is such as to reasonably raise the inference that the loan was not a gratuity, one who lends money to or makes advances for the benefit of another is entitled to interest on the sum advanced, although nothing was said about interest at the time the transaction was made."[26] Texas statutory provisions also militate against Amoco's argument. Article 5069-1.03 of the Texas Revised Civil

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[26] *Gray v. Laketon Wheat Growers, Inc.*, 240 S.W.2d 353, 356 (Tex. Civ. App. — Amarillo 1951, no writ).

Statutes provides: "When no specified rate of interest is agreed upon by the parties, interest at the rate of six percent per annum shall be allowed on all accounts and contracts ascertaining the sum payable, commencing on the thirtieth (30th) day from and after the time when the sum is due and payable."[27]

The instant case parallels that of *Dolenz v. American General Fire & Casualty Co.*[28] In *Dolenz*, the insurer tendered a greater sum to the insured than the actual amount of damages as determined at trial. The Dallas Court of Appeals held that the insurer was entitled to prejudgment interest on the amount tendered that was in excess of the amount of the loss. The court awarded prejudgment interest at the rate of six percent per annum, calculated for a period beginning on the thirtieth day from the date of overpayment and ending on the date of judgment.[29] Likewise, we award prejudgment interest to Vesta on the full amount of its loan/advance to Amoco at the rate of six percent per annum, for the period beginning on the thirtieth day following the date of the loan/advance payment and ending the date of this judgment.

III. CONCLUSION

For the reasons set forth above, we reverse the judgment of the district court and render judgment in favor of Vesta and against Amoco for $798,255, being the amount paid by Vesta to Amoco pursuant to the "loan/advance agreement." We further award prejudgment interest on that amount at the rate of six percent per annum for the period beginning on the thirtieth day after the date of payment of the loan/advance and ending on the date of this judgment.

REVERSED and RENDERED.

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[27] Tex.Rev.Civ.Stat. art. 5069-1.03 (Vernon 1987).

[28] 798 S.W.2d 862 (Tex. App. — Dallas 1990, writ denied).

[29] *Id.* at 864-65 (applying Tex.Rev.Civ.Stat. art. 5069-1.03).

ORDER ON PETITION FOR REHEARING

UNITED STATES DISTRICT COURT OF APPEALS

FOR THE FIFTH CIRCUIT

(APRIL 23, 1993)

Before WIENER, BARKSDALE and DeMOSS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

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United States Circuit Judge